

MEMORANDUM

FEBRUARY 7, 1985

TO: BOSTON REDEVELOPMENT AUTHORITY

FROM: STEPHEN F. COYLE, DIRECTOR

RE: WATERFRONT PROJECT, MASS R-77
ADOPTION OF CONFIRMATORY ORDER OF TAKING AND SETTLEMENT
AGREEMENTS CONCERNING ROWES/FOSTERS WHARF DEVELOPMENT SITE

On April 19, 1984 the Authority voted to adopt a "Notice of Intent to Take Real and Personal Property" relating to the fee simple title to Rows/Fosters Wharf as well as all right, title and interest of whatever nature that Boston Waterfront Associates I or its successors and assigns may have under a Land Disposition Agreement dated July 17, 1969. Subsequent to the adoption of that notice and its distribution to any person claiming an interest in the property to be taken, the Suffolk Superior Court determined that the Authority has the legal right to proceed with such taking. On February 1, 1985 the Court entered a Memorandum and Order, a copy of which is attached, determining that there are no continuing rights existing under that land disposition agreement.

The earlier judgment of the Superior Court referred to above requires the adoption of the attached Order no later than February 21, 1985. Since the more recent decision of the Court holding that the so-called "Second Phase LDA" is no longer in effect remains subject to appeal beyond that deadline, it is still necessary to proceed with a confirmatory taking. It is therefore recommended that the Authority, by adopting the attached resolution, authorize the taking by eminent domain of such fee and contract interests, if any, and the giving of notice of such taking in accordance with the requirements of Chapter 79 of the Massachusetts General Laws. In accordance with the Lease Commencement Agreement between the Authority and Rows Wharf Limited Partnership, the designated redevelopr of the Rows/Fosters Wharf site, the Authority has received an indemnity from Rows Wharf Limited Partnership holding the Authority harmless for any condemnation award which the Authority may become obligated to pay by reason of the adoption of the attached Order of Taking in excess of an agreed upon base amount.

However, based upon the strong decision of the Superior Court on February 1st, it is most unlikely that either the Authority or the redeveloper will have any actual financial responsibility as a result of this taking.

At its meeting of January 3, 1985 the Authority authorized the Director to enter into a Memorandum of Understanding with the redeveloper and DEQE relating to the future operation of the commercial maritime facilities at the new Rowes Wharf project, and the interim use of the Charlestown Navy Yard for certain of the boating activities now conducted from Rowes Wharf which will not continue there during construction or after completion of the project. At that meeting the Authority also received a report from the redeveloper as to the status of negotiations with Massachusetts Bay Lines, Inc., one of the boat operators now at Rowes Wharf. I am pleased to report that the redeveloper and the staff of the Authority have successfully negotiated an understanding with Massachusetts Bay Lines, Inc. for both its long term use of Rowes Wharf and its interim use of Charlestown Navy Yard. It is therefore appropriate that the Authority, by adopting the following votes, authorize the formalization of these agreements.

VOTED: That the Authority hereby adopts the attached resolution, including the Order of Taking dated February 7, 1985 referred to therein concerning the Rowes/Fosters Wharf development site in the Downtown Waterfront-Fanueil Hall Urban Renewal Project as more definitively described in Annex A to said Order of Taking; and

VOTED: That the Authority hereby adopts the attached resolution including the "Notice of Taking and Amount of Damages" dated February 7, 1985 referred to therein; and

VOTED: That the Director be and hereby is authorized to comply with any other applicable provisions of under Chapter 79 of Massachusetts General Laws that the Chief General Counsel determines necessary to effecuate the foregoing votes and to ensure clear title to the Rowes/Fosters Wharf development site.

VOTED: That the Authority, in its capacity as a member of the Rowes Wharf Operations Board, be and hereby is authorized to enter into an agreement with Massachusetts Bay Lines, Inc. entitled "Rowes Wharf Agreement" substantially in the form presented to this meeting; and that the Director

be and hereby is authorized to execute and deliver the said Rowes Wharf Agreement on behalf of the Authority, in such capacity, with such modifications thereto as the Director shall deem necessary or appropriate.

VOTED: That the Authority be and hereby is authorized to enter into an agreement with Massachusetts Bay Lines, Inc. entitled "Use and Occupancy Agreement" substantially in the form presented to this meeting authorizing the interim use and occupancy of portions of the Charlestown Navy Yard as more particularly described therein; and that the Director be and hereby is authorized to execute and deliver the said Use and Occupancy Agreement on behalf of the Authority with such modifications thereto as the Director shall deem necessary or appropriate.

4545

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

RESOLUTION

BE IT RESOLVED by the Boston Redevelopment Authority that an Order of Taking dated **FEB 7 1985** relating to a portion of the DOWNTOWN WATERFRONT-FANEUIL HALL URBAN RENEWAL AREA, MASS. R-77, be executed and made a permanent part of these proceedings, a copy of which the Secretary shall cause to be recorded in the office of the Registry of Deeds for the County of Suffolk.

A true copy

CERTIFICATE

I hereby certify that the following names constitute the entire membership of the Boston Redevelopment Authority:

Robert L. Farrell
Joseph J. Walsh
James K. Flaherty

William A. McDermott, Jr.
Clarence J. Jones

A true copy

ATTEST:

Karis J. J. J.
Secretary of the Boston Redevelopment
Authority

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

BOSTON REDEVELOPMENT AUTHORITY

ORDER OF TAKING

WHEREAS, the BOSTON REDEVELOPMENT AUTHORITY adopted and filed in the Suffolk County Registry of Deeds, Book 7929, Page 440, an Order of Taking dated February 4, 1965, concerning and describing the Downtown Waterfront-Faneuil Hall Urban Renewal Area, all of the findings, determinations and descriptions set forth therein being incorporated herein by reference and made a part hereof.

AND WHEREAS, the Boston Redevelopment Authority in accordance with the provisions of General Laws, Chapter 121B, Section 11(d), has deposited with the Mayor of the City of Boston security to his satisfaction for the payment of such damages as may be awarded in accordance with law to the owner or owners of the property subject to this Order of Taking, as required by General Laws, Chapter 79, Section 40.

NOW THEREFORE BE IT ORDERED that the Boston Redevelopment Authority, acting under the provisions of General Laws, Chapter 121B and without limiting the generality of the foregoing, of Section 11(d) of said General Laws, Chapter 121B, and all other authority thereunto enabling, and pursuant to the applicable provisions of General Laws, Chapter 79, and of any and every power and authority to it, granted or implied, hereby takes for itself by eminent domain, for the purposes hereinbefore set forth or referred to, the following real and personal property:

- (a) In fee simple, the real property located in the City of Boston as hereinafter described in "Annex A" attached hereto, together with any and all easements and rights of whatever nature or description appurtenant thereto, including any trees, buildings and other structures standing upon or affixed thereto, and including the fee, if any, in all public streets, highways and public ways in said area or areas contiguous and adjacent to the area or areas taken hereby,

provided such fee is a part of said real property, except any and all easements of travel in and to any and all public streets, highways and public ways in said area or areas or contiguous and adjacent thereto, and

- (b) All right, title and interest of whatever nature or description, of Boston Waterfront Associates I or its successors in interest or assigns, in or under or in any way related to the Land Disposition Agreement made and entered into on July 17, 1969, by and between the Boston Redevelopment Authority and Boston Waterfront Associates I.

AND BE IT FURTHER ORDERED that in accordance with the provisions of the General Laws, Chapter 79, Section 6, awards are hereby made by the Boston Redevelopment Authority for damages sustained by the owner or owners and all other persons having any and all interest in the property described herein and entitled to any damages by reason of the taking hereby made. The Boston Redevelopment Authority reserves the right to amend such awards at any time prior to the payment thereof by reason of a change in ownership or value of said property before the right to damages therefor has become vested or for other good cause shown. The awards hereby made are set forth in "Annex C", which is not to be recorded in the Registry of Deeds with the Order of Taking, nor filed for registration in the registered land section of said Registry of Deeds.

AND BE IT FURTHER ORDERED that the Secretary of the Boston Redevelopment Authority shall forthwith, but not later than thirty days from the date of adoption hereof, cause this instrument of Taking to be recorded in the office of the Suffolk County Registry of Deeds and shall cause to be filed for registration with the registered land section of the Suffolk County Registry of Deeds a description of all registered land subject to this Order of Taking, containing all the information required by General Laws, Chapter 79, Section 4.

AND BE IT FURTHER ORDERED that the Secretary of the Boston Redevelopment Authority shall forthwith cause notice of this Order of Taking to be given pursuant to the General Laws, Chapter 79, Sections 7C and 7F, to the persons or entities listed on Annex B attached hereto.

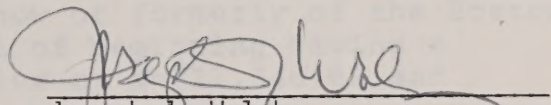
AND BE IT FURTHER ORDERED that this Order of Taking does not and is not intended to constitute, nor shall it be deemed to constitute, a finding, determination, vote, resolution, order, admission, statement or opinion of the Boston Redevelopment Authority that any person or entity other than the Boston Redevelopment Authority (whether listed or not on "Annex B" attached hereto) has any right, title or interest of any nature or description in the real or personal property which is the subject of this Order of Taking.

IN WITNESS WHEREOF, we, the following members of the Boston Redevelopment Authority, have caused the corporate seal of the Authority to be hereto affixed and these presents to be signed in the name and on behalf of the Boston Redevelopment Authority.

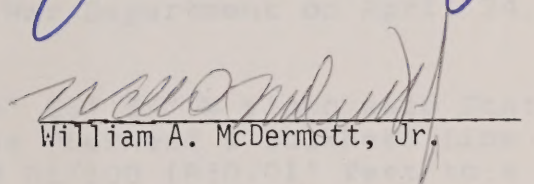
DATED: FEB 7 1985

BOSTON REDEVELOPMENT AUTHORITY

Robert L. Farrell

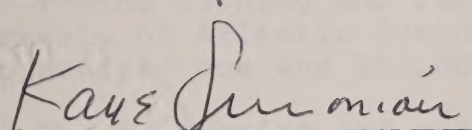

Joseph J. Walsh

James K. Flaherty

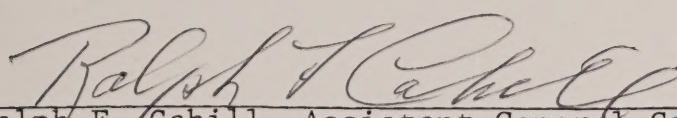

William A. McDermott, Jr.

Clarence Jones

ATTEST:


Secretary of the Boston Redevelopment Authority

APPROVED AS TO FORM:


Ralph F. Cahill, Assistant General Counsel

ANNEX A

BOSTON REDEVELOPMENT AUTHORITY

ORDER OF TAKING

REAL PROPERTY DESCRIPTION

The following is the parcel of real property subject to the foregoing Notice of Intent to Take Real and Personal Property:

A parcel of land and water known as Rows and Fosters Wharves, on Atlantic Avenue in Boston, Suffolk County, Massachusetts, bounded and described as follows:

Beginning at a point on the easterly sideline of Atlantic Avenue, said point being the northwest corner of the property to be described, said property being now or formerly of the Boston Redevelopment Authority, said point of beginning having a Massachusetts Coordinate System value of X=721,346.69 and Y=494,815.18;

Thence running N 71° 12' 21" E along land or formerly of First City Developments Corp. of Boston - Harbor Towers II, a distance of six hundred forty-six and 50/100 (646.50) feet to a point on the State Harbor Line and former United States Pierhead & Bulkhead Line established by the War Department on April 24, 1940;

Thence turning and running S 28° 55' 55" W along said State Harbor Line and former United States Pierhead & Bulkhead Line a distance of eight hundred fifty and 01/100 (850.01) feet to a point;

Thence turning and running N 69° 05' 34" W along a line perpendicular to the Harbor Line in Boston Harbor established by Chapter 170 of the Acts of 1880 a distance of thirty-three and 12/100 (33.12) feet to a point;

Thence turning and running N 78° 09' 39" W along land now or formerly of Atlantic Avenue Limited Partnership, a distance of two hundred one and 29/100 (201.29) feet to a point;

Thence turning and running N 9° 10' 35" E, along the easterly sideline of said Atlantic Avenue, a distance of two hundred thirty-one and 00/100 (231.00) feet to a point;

Thence turning and running N 2° 11' 11" W along the easterly sideline of said Atlantic Avenue, a distance of two hundred fifty-four and 67/100 (254.67) feet to the point of beginning,

said parcel containing 234,224 square feet, more or less and being shown on a plan entitled "Property Line Plan for The Beacon Companies, Atlantic Avenue, Boston, Massachusetts" dated April 16, 1984, Scale 1 inch = 40 feet, prepared by Cullinan Engineering Co., Inc.

Included in said parcel is a certain parcel of registered land bounded and described as follows:

Westerly by the easterly line of Atlantic Avenue, fifty-seven and 84/100 (57.84) feet;
Northerly by land now or formerly of the Proprietors of Rowes Wharf about two hundred fifty-eight (258) feet;
Easterly by the Harbor line as defined by Chapter 229 of the Acts of 1837, thirty-four (34) feet;
Southerly by the northerly line of Belchers Lane extended about one hundred ninety-four (194) feet;
Easterly by extreme low water mark of Boston Harbor;
Northerly by the southerly line of said Belchers Lane extended about one hundred eighty-seven (187) feet;
Easterly by said Harbor line about nineteen (19) feet; and
Southerly by land now or formerly of Foster's Wharf Company, about two hundred thirty-seven and 95/100 (237.95) feet.
All of said boundaries except the water line and the exact location of said Harbor line are determined by the Court to be located as shown on a plan drawn by Whitman & Howard, Civil Engineers, dated October 29, 1943, as modified and approved by the Court, filed in the Land Registration Office as plan No. 18896-A, a copy of a portion of which is filed with Certificate of Title No. 46107.

The above described land is subject to and has the benefit of taking Document No. 294838.

Said parcel of registered land is described on Certificate of Title No. 80504.

ANNEX B

BOSTON REDEVELOPMENT AUTHORITY

ORDER OF TAKING

PERSONS TO RECEIVE NOTICE

Notice of the foregoing Order of Taking shall be given to the following:

- (a) Boston Waterfront Associates I
c/o Dreyfus Properties
131 State Street
Boston, Massachusetts 02109

and

Boston Waterfront Associates I
340 East 46th Street
New York, New York

- (b) First City Developments Corp. of Boston -
Harbor Towers I
85 East India Row, Suite 29B
Boston, Massachusetts 02110
Attention: Gregory A. Rand, President

- (c) City of Boston
Treasury Department
Collecting Division
City Hall
One City Hall Square
Boston, Massachusetts 02202

(Not to be recorded or filed for registration)

ANNEX C

BOSTON REDEVELOPMENT AUTHORITY

ORDER OF TAKING

AWARD OF DAMAGES

In connection with the taking described in the foregoing Order of Taking, the following award of damages is hereby made:

- | | | |
|-----|--|-----|
| (a) | Boston Waterfront Associates I | \$0 |
| (b) | First City Development Corp. of
Boston - Harbor Towers I | \$0 |
| (c) | any and all other persons or
entities claiming an interest in
the property taken, including
without limitation, any pre-
decessors, successors or assigns
of the entities listed in (a)
or (b) above | \$0 |

ROWES WHARF AGREEMENT

AGREEMENT made this _____ day of _____, 1985 by and between Massachusetts Bay Lines, Inc., a Massachusetts corporation ("Bay Lines") and the Boston Redevelopment Authority (the "BRA"), the Department of Environmental Quality Engineering of the Executive Office of Environmental Affairs ("DEQE") and Rowes Wharf Limited Partnership, a Massachusetts limited partnership (the "Partnership"), the BRA, DEQE, and the Partnership comprising a three member board (the "Operations Board") established and existing pursuant to the Determination, as hereinafter defined.

PRELIMINARY STATEMENT

The Partnership is the designated redeveloper of an urban renewal site owned by the BRA in the Downtown Waterfront-Faneuil Hall Urban Renewal Area consisting of Rowes Wharf and Fosters Wharf and more particularly described as the Site in the Determination. The Partnership proposes to redevelop the Site by construction of a mixed-use project thereon. Such project requires the issuance of a waterways license pursuant to Massachusetts General Laws Chapter 91. On December 20, 1984 DEQE issued its "Determination for Issuance of a Waterways License Pursuant to General Law Chapter 91 (the "Determination") with

respect to the project proposed by the Partnership. Terms used herein which are defined in the Determination shall have the meanings ascribed therein unless the context otherwise requires.

Bay Lines has operated commercial maritime service from the Rowes Wharf portion of the Site for over 20 years, initially as a tenant of private land owners and, subsequent to the eminent domain taking of Rowes Wharf by the BRA, as a tenant at will of the BRA. The project proposed by the Partnership and approved in the Determination includes the construction of a commercial maritime terminal. In recognition of the long term operation by Bay Lines from Rowes Wharf of commercial maritime service, the Operations Board has agreed to confer upon Bay Lines a preference for use of the commercial maritime terminal, on the terms and conditions hereinafter set forth, to assure Bay Lines that it may continue to provide commercial maritime service to the public from the Site at levels commensurate with its prior operations and its reasonable expectation as to future growth.

I. General Applicability of Rules and Regulations.

As set forth in the Determination, the maintenance and management of the commercial maritime terminal is subject to the direction and control of the Operations Board which is to formulate operating rules and regulations for the commercial

maritime terminal. As further set forth in the Determination, the day to day management of the commercial maritime terminal shall fall under the responsibility of a full-time maritime facilities manager (the "Manager") selected by and subject to the control of the Operations Board. Except to the extent specifically provided herein to the contrary, the use by Bay Lines of the commercial maritime terminal pursuant to the rights conferred herein shall be fully subject to such reasonable rules and regulations adopted from time to time by the Operations Board and administered by the Manager. Without limiting the generality of the foregoing, Bay Lines shall enter into, and shall comply with the terms of, such license or use and occupancy agreements as are required of all persons utilizing the commercial maritime terminal, but in the case of conflict between such agreements and the provisions of this Agreement, the provisions herein contained shall govern. Nothing herein contained shall be construed to limit or restrict the right of Bay Lines to seek to use the commercial maritime terminal for commuter, excursion or charter service at levels in excess of those described herein on the same terms and conditions as are generally applied to other persons seeking the use of the commercial maritime terminal.

II. Preference for Active Use of the Commercial Maritime Terminal.

In the establishment of a schedule for the use of dock space in the commercial maritime terminal, the Operations Board and the Manager shall give first priority preference, as hereinafter defined, to requests by Bay Lines for use of such dock space over requests made for such use by any other operator providing commercial maritime service from the Site, subject to the limitations and conditions hereinafter set forth. As used herein, first priority preference shall mean the obligation of the Operations Board and the Manager to permit Bay Lines to schedule vessel departures and returns on its request in accordance with the terms of this Agreement.

1. Such preference shall be limited to a maximum of 12 vessel departures and 12 vessel returns per day; provided, however, that such limitation shall increase by one-half trip per day for each calendar year, or portion thereof, that this Agreement remains in effect.

2. Of such 12 vessel departures and returns per day, at least 5 shall occur pursuant to a fixed schedule made known to the Manager no later than February 1st in each year that this Agreement remains in effect.

3. The exercise by Bay Lines of the right to the preference described in this Paragraph I. shall not result in the use by Bay Lines at any single time of more than 210 lineal feet of dock space at the commercial maritime terminal. The foregoing limitation shall not be construed to limit or restrict the right of Bay Lines to seek to use more than 210 lineal feet of dock space at the commercial maritime terminal on the same terms and conditions as are generally applied to other persons seeking the use of such dock space.

4. As to any vessel departures and vessel returns which are not subject to a fixed scheduled, the Manager need not prefer a request for dock space made by Bay Lines unless such request is made at least 48 hours in advance of the proposed time of departure of such vessel. Bay Lines hereby agrees that it shall endeavor to provide notice of its requests for dock space to which the preference herein described extends as soon as charters are committed and otherwise as far in advance of the vessel departure as is practicable, but failure to provide such advance notice shall not effect the rights conferred upon Bay Lines hereunder.

5. The rights herein conferred upon Bay Lines shall be exercisable with respect to the use of dock space at the commercial maritime terminal between the hours of 8:00 a.m. and 12:00 a.m. (midnight) daily.

6. Bay Lines may not apply the preference rights herein conferred to the operation of more than four vessels.

III. Preference for Passive Daytime and Nighttime Layover.

The Operations Board hereby agrees with Bay Lines that it shall allow vessels operated by Bay Lines to layover at the commercial maritime terminal between the hours of 8:00 a.m. and 12:00 a.m. (midnight) daily for "Daytime Layover" and between the hours of 12:00 a.m. (midnight) and 8:00 a.m. for "Nighttime Layover" subject to the following limitations and conditions:

1. Layover of vessels shall only be permitted to the extent that such layover does not conflict with or interfere with the maximum feasible continuous utilization of the commercial maritime terminal by all qualified maritime operators seeking to use the same.

2. The maximum number of lineal feet of dock space which may be occupied by Bay Lines pursuant to the provisions of this Paragraph III. is 210 feet reduced by the amount of lineal feet of dock space in active use by Bay Lines from time to time pursuant to Paragraph II; provided, however, that prior to January 1, 1989 such maximum number of lineal feet of dock space for Daytime Layover shall be 103 feet. The foregoing limitation shall not be construed to limit or restrict the right of Bay Lines to seek to use more than 210 lineal feet of dock space at

the commercial maritime terminal on the same terms and conditions as are generally applied to other persons seeking the use of such dock space.

3. The grant to Bay Lines of such layover rights shall not be construed to permit any activities, otehr than layover, which are prohibited by rules and regulations from time to time in effect for the commercial maritime terminal.

4. The rights herein conferred for layover shall apply only during the period from May 1st to November 1st in each year that this Agreement is in effect.

5. No vessel shall be layed over which is not seaworthy and in regular use by Bay Lines.

IV. Preservation of Preference Rights.

The preference for active use for the commercial maritime terminal described in Paragraph II. above shall continue for the period this Agreement remains in effect but only to the extent that such preference is fully utilized, as hereinafter defined, by Bay Lines. Such preference shall be deemed fully utilized if Bay Lines shall actually operate 12 vessel departures and 12 vessel returns, or the increased number of departures and returns calculated in accordance with the provisions of Paragraph II.1. above, on 65% of the calendar days in the period from June 1st through August 31st in each year this Agreement is in effect. If

in any two consecutive years subsequent to 1988 Bay Lines shall not so fully utilize the preference rights for active use herein conferred, the Operations Board may reduce the right to preference in the scheduling of vessel departures and returns for the remainder of the term of this Agreement to the average number of departures and returns actually operated on 65% of the calendar days in such period during the preceding two years, but only after affording to Bay Lines an opportunity to show cause why such reduction should not be imposed. For the purpose of calculating full utilization as herein defined, any weekday commuter service operated by Bay Lines pursuant to the rights conferred in this Agreement shall be deemed to operate on weekends also.

V. Term of Agreement.

This Agreement shall remain in full force and effect commencing upon the date hereof and ending on May 25, 2004, such ending date being the expiration of the Downtown Waterfront-Fanueil Hall Urban Renewal Plan. The preference rights conferred herein shall commence upon completion of construction of the commercial maritime terminal as evidenced by the issuance by the City of Boston Inspectional Services Department of a Certificate of Occupancy, or partial Certificate of Occupancy, authorizing occupancy of the entire commercial maritime terminal.

VI. Governing Law; Assignment; Merger.

This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts. The rights of Bay Lines conferred herein shall not be assignable but shall inure to the benefit of any corporation resulting from a merger with or reorganization of Bay Lines. The obligations of the Operations Board hereunder shall be binding upon any person or entity, including the Partnership and its successors and assigns, succeeding to the management and control functions of the Operations Board set forth in the Determination. This Agreement supercedes all prior discussions or offers among the parties hereto, written or oral, with regard to the subject matter hereof, and may only be amended in writing signed by the Operations Board and Bay Lines.

Executed under seal the day and date first above written.

MASSACHUSETTS BAY LINES, INC.

By: _____

OPERATIONS BOARD

BY: BOSTON REDEVELOPMENT AUTHORITY

By: _____

[signatures continued on following page]

BY: DEPARTMENT OF ENVIRONMENTAL
QUALITY ENGINEERING OF THE
EXECUTIVE OFFICE OF
ENVIRONMENTAL AFFAIRS

By: _____

BY: ROWES WHARF LIMITED
PARTNERSHIP

By: _____

USE AND OCCUPANCY AGREEMENT

AGREEMENT made this _____ day of _____, 1985
by and between Massachusetts Bay Lines, Inc., a Massachusetts
corporation ("Bay Lines") and the Boston Redevelopment Authority,
a body politic and corporate existing pursuant to M.G.L. Chapter
121B and Chapter 652 of the Acts of 1960, as amended ("BRA").

WHEREAS, the BRA is the owner of an urban renewal parcel in
the Downtown Waterfront-Faneuil Hall Urban Renewal Area
consisting of Rows Wharf and Fosters Wharf, for which parcel the
BRA has designated Rows Wharf Limited Partnership, a
Massachusetts limited partnership, as redeveloper to carry out
the construction of a mixed-use project thereon; and

WHEREAS, Bay Lines has operated commercial maritime service
from Rows Wharf as a tenant at will of the BRA; and

WHEREAS, the BRA has served notice upon Bay Lines to quit and
surrender its use and occupancy of Rows Wharf in order to permit
redevelopment of such parcel; and

WHEREAS, the BRA has offered Bay Lines the opportunity to
relocate to a portion of the Charlestown Navy Yard owned by the
BRA on an interim basis, on the terms and conditions hereinafter
set forth, to conduct those portions of Bay Lines' business which
cannot be conducted at Rows Wharf during construction of such

mixed-use project or in the commercial maritime terminal of the completed project; and

WHEREAS, the BRA has committed to work with the Executive Office of Environmental Affairs, the Executive Office of Transportation and Construction, Rowes Wharf Limited Partnership, Bay Lines and others interested in Boston Harbor to locate a facility from which the activities authorized herein on an interim basis only can be conducted permanently; and

WHEREAS, the parties desire to set forth the terms of such use and occupancy by Bay Lines of such portion of Charlestown Navy Yard;

NOW, THEREFORE, in consideration of the mutual promises set forth herein, and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Surrender of Rowes Wharf. Bay Lines hereby acknowledges that it has no further right to use and occupy Rowes Wharf, or any portion thereof, as a tenant of the BRA and that its tenancy at Rowes Wharf has been legally and effectively terminated in accordance with all applicable Massachusetts and federal laws, codes, and regulations. Bay Lines shall remove or cause the removal of all of its property and equipment now located on Rowes Wharf, including, without limitation, trailers, ice machines,

refrigerators, and vessels not in daily service within ten (10) business days from the date hereof.

2. Right to Use and Occupy. BRA hereby authorizes Bay Lines to use and occupy, under the terms and conditions herein set forth, those portions of the Charlestown Navy Yard herein enumerated, which portions are identified on Exhibit A annexed hereto and incorporated herein by this reference, for the servicing, maintenance, layover, provisioning, fueling and similar functions to vessels operated by Bay Lines and for the storage of goods and materials related thereto. Bay Lines shall not use such portions of the Charlestown Navy Yard for the embarkation or disembarkation of passengers to or from Bay Lines vessels without the prior consent of the BRA. BRA hereby agrees that access to all of the areas described herein may be gained through "Gate 5" of the Charlestown Navy Yard at all reasonable and necessary hours that Bay Lines may requires the same.

A. For the period commencing on the date hereof through the date of completion of the commercial maritime terminal in the Poves Wharf redevelopment project, as hereinafter defined, (the "Construction Period"), Bay Lines may use and occupy pursuant to this Agreement 300 lineal feet of dock space on Wharf No. 11 in the location shown on Exhibit A. Such right to use and occupy shall include the right to

install and use a floating dock within all or a portion of a such 300 lineal feet.

B. For the period commencing on the date of completion of the commercial maritime terminal in the Rows Wharf redevelopment project, as hereinafter defined, through the date of termination of the rights conferred by this Paragraph 2.B, Bay Lines may use and occupy pursuant to this Agreement 200 feet of lineal dock space on Wharf No. 11 in the location shown on Exhibit A. Such right to use and occupy shall include the right to install and use a floating dock within all or a portion of a such 200 lineal feet.

C. For the period commencing on the date hereof through the date of termination of the rights conferred by this Paragraph 2.C, Bay Lines may install, maintain and use the five trailers, two walk-in coolers and three ice machines now located on Rows Wharf in the location shown on said Exhibit A; provided, however, that from and after the issuance to Bay Lines by the City of Boston Inspectional Services Department of a Certificate of Occupancy for Building 165 or Buildings 165 and 165A, Bay Lines' right to maintain and use trailers pursuant to this Agreement shall be reduced to three such trailers. To the fullest extent possible, Bay Lines shall attempt to consolidate its activities into Buildings 165 and

1655A in order to lessen the impact upon the Charlestown Navy Yard from the storage of trailers and other equipment pursuant to this Agreement.

D. For the period commencing on the date hereof through the date of termination of the rights conferred by this Paragraph 2.D, Bay Lines may use and occupy Buildings 165 and 165A as shown on Exhibit A.

E. For the period commencing on the date hereof through the date of termination of all other rights conferred by this Agreement, Bay Lines shall have the right to park automobiles of its employees in such locations designated from time to time by the BRA in reasonable proximity to the areas described on Exhibit A, which areas shall not, in the aggregate, contain less than 5,500 square feet. From and after the opening for business of the parking facility to be constructed in Building 199 of the Charlestown Navy Yard, the availability of public parking therein shall fully satisfy the obligation of the BRA under this Paragraph 2.E.

As used herein, completion of the commercial maritime terminal in the Rowes Wharf redevelopment project shall mean the issuance by the City of Boston Inspectional Services Department of a Certificate of Occupancy, or partial Certificate of Occupancy, authorizing occupancy of the entire commercial maritime terminal.

3. Term. The rights to use and occupy dock space on Wharf No. 11 set forth in Paragraph 2.A supra, shall remain in full force and effect for the Construction Period. The right to install, maintain and use trailers and other equipment set forth in Paragraph 2.C supra, and the rights to use and occupy Buildings 165 and 165A set forth in Paragraph 2.D supra, shall remain in full force and effect for the Construction Period and thereafter from month to month until terminated by the BRA upon ninety (90) days prior written notice to Bay Lines. The rights to use and occupy dock space on Wharf No. 11 as set forth in Paragraph 2.B supra, shall remain in full force and effect for a term beginning at the expiration of the Construction Period and continuing from month to month thereafter until terminated by the BRA upon ninety (90) days prior written notice to Bay Lines. The rights to park employee automobiles set forth in Paragraph 2.E, supra, shall terminate simultaneously with the last to terminate of any of the rights conferred in Paragraph 2 hereof. Subject to the provisions of the first two sentences of this paragraph, the BRA may exercise its rights to terminate the use and occupancy rights of Bay Lines separately under each subparagraph of Paragraph 2.

Bay Lines hereby acknowledges that the areas shown on Exhibit A to which use and occupancy rights conferred herein

extend are portions of redevelopment parcels in the Charlestown Urban Renewal Area and that, with the exception of the rights set forth in Paragraphs 2.A, 2.B and 2.C supra for the Construction Period, its rights hereunder are subject and subordinate to the rights of such redevelopers as may be designated by the BRA from time to time to redevelop all or any portion of such area. No rights or interest in the areas which are the subject of this Agreement beyond the temporary use and occupancy rights explicitly set forth herein are conferred by this Agreement.

4. Use and Occupancy Charge. Bay Lines shall pay to the BRA a use and occupancy charge for the rights herein conferred as follows:

A. During the Construction Period, \$3,000 per annum.

B. For all periods that the rights conferred under this Use and Occupancy Agreement shall remain in effect subsequent to the Construction period:

(i) \$6,000 per annum for the use of dock space on Pier 11 as described in Paragraph 2.B. supra, plus

(ii) if use and occupancy is permitted thereof during the relevant period, a use and occupancy charge for Buildings 165 and/or 165A determined by multiplying the number of square feet in such buildings used or occupied by Bay Lines by the average cost per square

foot for the rental of storage space in the surrounding Charlestown neighborhood, which amount shall be determined by the BRA within thirty (30) days after the end of the Construction Period and annually thereafter.

All amounts payable hereunder shall be paid in equal monthly installments commencing on the first day of February and every month thereafter that this Agreement remains in full force and effect.

5. Utility Service. Bay Lines shall cause the following utility service to be made available to the "utility distribution point" shown on Exhibit A, any or all of which utilities may be supplied by temporary lines:

A. 220 volt, three-phase AC electrical current;

B. Low pressure fresh water service sufficient to provide water to ice makers, hose for dockside use and domestic hot water. Such water line need only be useable for the period from April 1st through November 1st in each year;

C. A sanitary sewer connection for domestic sewerage, which connection need only be useable for the period from April 1st through November 1st in each year.

BRA shall reimburse Bay Lines for 1/3 of the capital cost of providing the foregoing utility lines and services within 10 business days after presentation of an invoice therefor. All

fees and charges for the use of electricity, water and sewer lines shall be borne by Bay Lines exclusively.

6. Governing Law; Assignment; Merger. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts. The right of Bay Lines conferred herein shall not be assignable but shall inure to the benefit of any corporation resulting from a mereger with or reorganization of Bay Lines. The obligations of the BRA hereunder shall be binding upon its successors and assigns. This Agreement supercedes all prior discussssions or offers between the parties hereto, written or oral, with regard to the subject matter hereof, and may only be amended in writing signed by the BRA and Bay Lines.

Executed under seal the day and date first above written.

MASSACHUSETTS BAY LINES, INC.

By: _____

BOSTON REDEVELOPMENT AUTHORITY

By: _____

Copy

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 67163

FIRST CITY DEVELOPMENT CORP. OF BOSTON-
HARBOR TOWERS I

vs.

BOSTON REDEVELOPMENT AUTHORITY, NORMAN LEVENTHAL AND
THE BEACON COMPANIES, INC.

MEMORANDUM OF DECISION AND ORDER

On July 17, 1969, the Boston Redevelopment Authority (BRA) and Boston Waterfront Associates (BWA) entered into a "Second Phase Land Distribution Agreement" (2nd LDA). By the terms of that agreement, BWA was to have an option to buy a particular parcel of land (Lot 3T(b)) along the Boston waterfront on which to build a third harbor tower. The contract designated the period in which the option could be exercised, as well as the terms under which the option could be assigned. On April 2, 1981, BWA attempted to assign its interest in the 2nd LDA to First City Development Corp. of Boston (FCDC). Sometime in 1983 it became evident that the BRA intended to sell the subject lot to another developer. As of

that date the option under the 2nd LDA had not been exercised. The BRA now claims that the option has lapsed or, even if it didn't lapse, it is unenforceable for various other legal reasons. FCDC, on the other hand, claims that the option is still enforceable and that the BRA has no right to sell the land until it is given a right of first refusal. The language of the 2nd LDA is extremely ambiguous and on that account this dispute has arisen.

INTERPRETATION OF THE SECOND LDA

Section 201 of the 2nd LDA sets out the conditions under which the option to buy the land for a third harbor tower could be exercised. After the first two harbor towers were 50 percent occupied, and after relocation and construction of Atlantic Avenue was completed, the optionee was to have three months within which to notify the BRA of its intent to purchase. Both preconditions to the exercise of the option were fulfilled long before this dispute arose. The option was never exercised. Accordingly, it would appear that the rights of the optionee have lapsed.

FCDC, however, claims that its option remains alive on account of language in a subsequent clause of Section 201. That clause states that if the optionee does not give notice of

its intent to purchase within the required three-month period, the BRA will then have the right to notify the optionee of its desire to terminate the 2nd LDA. More importantly, the latter language provides that if the BRA gives such notice, the optionee will have ten (10) days in which to exercise the option. In other words, FCDC is arguing that, even if it didn't exercise the option within three months, it still holds an indefinite right of first refusal should the BRA ever try to sell the land.

The language of Section 201 is clearly contradictory. FCDC essentially argues that its option should last forever, or, at the very least, for the forty-year duration of the Boston Urban Renewal Plan. On the other extreme, the BRA claims that plaintiff's option lapsed after the specified three-month period.

Plaintiff's interpretation of the 2nd LDA is logically inconsistent. As the intervenors point out in their memorandum, plaintiff relies on a literal reading of the contract in determining that it has an indefinite option. By the same token, the language of Section 201 also provides that the optionee is powerless to exercise the option after the specified three-month period. Thus, the optionee's rights would be wholly dependent on the whim of the BRA. This makes

no sense. Furthermore, it is incomprehensible that the BRA meant to give an indefinite option to purchase the land on which to build a third harbor tower.

It is a maxim of contract law that, where two clauses of a contract are repugnant to one another, the agreement's interpretation should be guided by the intent of the parties as construed from the contract as a whole. Sasinowski v. Boston & M.R.R., 74 F.2d 628, 633 (1st Cir. 1935); J. Derenzo Co. v. Taylor, Woodrow, Blitman Construction Corp., 3 Mass. App. Ct. 783 (1975). Where the wording of a contract is ambiguous, it "should be construed in accordance with justice and common sense and the probable intention of the parties." Bowser v. Chalifour, 334 Mass. 348, 352 (1956). See also, Clark v. State Street Trust Co., 270 Mass. 140, 153 (1930); Fried v. Fried, 5 Mass. App. Ct. 660, 664 (1977); Stop & Shop, Inc. v. Ganem, 347 Mass. 697, 701 (1964). Thus, even when one clause of a contract is contrary to the other clauses, as here, the entirety of the contract should control. "[A] construction which comports with the Agreement as a whole is to be preferred even if it be thought that certain language, viewed only by itself, more readily suggests something else." Taunton Municipal Lighting Plant v. Quincy Oil, Inc., 503 F.Supp. 235 (D. Mass. 1980), aff'd, 669 F.2d 710 (Temp. Emer. Ct. App., 1982).

Accordingly, the Court should make a reasonable interpretation of when the option was supposed to lapse. Clues to that can be found both inside and outside the contract. First of all, a "Certificate of Vote" was attached to the 2nd LDA. It provides that the rights of the optionee are "terminable" if construction on a third harbor tower has not commenced, at the latest, within "six years after the execution of the agreement." This certainly seems to place an outside date by which the option must be exercised. FCDC argues that, even under the Certificate of Vote, the BRA would still have to follow the Section 201 termination procedures. However, that argument is inconsistent with an attempt to discover a reasonable interpretation of when the option was meant to lapse. To make such an argument is to thrust the issue back into the same circular ambiguity created by the contractual language.

Even if the Certificate of Vote were not a part of the agreement, it provides a strong argument that any language inconsistent with it would be ultra vires and unenforceable against the BRA. "Persons dealing with a municipality must take notice of limitations . . . upon the contracting power of the municipality and are bound by them and cannot recover upon contracts attempted to be made in violation of them."

Adalian Brothers, Inc. v. City of Boston, 323 Mass. 629, 631 (1949). See also, Ryan v. City of Somerville, 328 Mass. 324, 325 (1952). In dealing with a municipality, "a person is bound at his peril to ascertain the extent of the authority of the public officer with whom he deals." Wormstead v. City of Lynn, 184 Mass. 425, 428 (1903). While the BRA is actually a public agency, it is bound by similar limitations. In this case, the Certificate of Vote sets up a clear time limit within which an option granted by the BRA must be exercised. The BRA is powerless to extend the time limit.

The present dispute could be most easily resolved by an alternate interpretation of the clause in the contract which provides the terms for the BRA's termination of the option. Massachusetts courts have consistently held that contract clauses "should not be construed as repugnant unless [they are] irreconcilable." Ferguson v. Union Mutual Life Insurance Co., 187 Mass. 8, 10 (1904). See also, Knower v. Emerson, 26 Mass. 422, 424 (1830). "Where clauses of a written agreement appear to conflict, a court must read them as if they are not in conflict if such an interpretation is reasonably possible." Truck Drivers, Chauffeurs, & Helpers Union, Local 42 v. International Brotherhood of Teamsters, 482 F.Supp. 266, 271 (D. Mass. 1979) (emphasis added).

The disputed clause in this contract states that the BRA "shall . . . have the right to notify the [optionee] that it desires to terminate all further obligations of either party" under the 2nd LDA (emphasis added). It does not say that the BRA must notify the optionee of its desire to terminate. Rather, the BRA may notify the optionee if it wishes to give it a right of first refusal. Only after such discretionary notification do any further rights flow to the optionee. Barring such notification, the optionee's rights in the subject property terminated.

This interpretation is at least as plausible as that of the plaintiff. Furthermore, it would be more consistent with the rest of the contract. Since contract clauses should be read as consistent with one another whenever possible, this construction should be adopted. The BRA never notified the optionee, as was its right, of its desire to terminate. Accordingly, no rights in the optionee were revived and the BRA is free to do whatever it wishes with the property.

A final argument against an indefinite option is found in the words of Chapter 121B, Section 49 of the Massachusetts General Laws. That statute states that if any urban renewal agency (including the BRA) sells any property for an urban renewal project, the purchaser is obligated to begin building

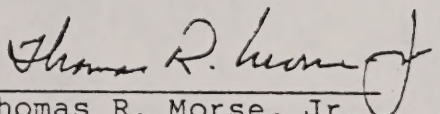
within a "reasonable time." Mass. Gen. Laws Ann. Ch. 121B, § 49 (West Supp. 1984). The plaintiff argues that the instant property was not sold to it, but was merely the subject of an option and that, therefore, the statute does not apply. Only in the most technical sense is that true. In any event, courts are loathe to enforce agreements which are contrary to public policy. DiLeo v. Daneault, 329 Mass. 590, 595 (1953). The purposes of the statute are to prevent speculation in land designated for urban renewal and to assure speedy completion of meritorious urban renewal projects. If plaintiff held an indefinite option, the purposes of the statute would be clearly violated. Also, unwanted speculation would be vindicated and FCDC would be allowed to build a now unwanted third harbor tower. Even if the contract construction urged by the plaintiff does not violate public policy, the statute does assist in a determination of justice, common sense and the probable intent of the parties. Bowser, 334 Mass. at 352. For these reasons, the Court could find that the 2nd LDA is governed by the parameters of chapter 121B, Section 49. What a "reasonable time" would be is unclear. However, it is clear as a matter of law that such time has passed.

CONCLUSION

Issues such as the Rule Against Perpetuities and the validity of the assignment to FCDC are significant only if it is found that the optionee still has a valid right of first refusal. The provisions of the 2nd LDA are extremely ambiguous. However, it is unreasonable to believe that either party to the contract intended the option (or right of first refusal) to be indefinite. That conclusion is aided by the Certificate of Vote and Chapter 121B, Section 49 of the Massachusetts Laws. Furthermore, a different interpretation of the clause providing the method by which the BRA could terminate the optionee's rights under the 2nd LDA would eliminate such rights. An argument that the optionee's right of first refusal could only arise at the BRA's discretion is entirely plausible. This construction would be more consistent with the rest of the contract. Given these arguments, I conclude that the option to purchase the land for a third harbor tower lapsed when it was not exercised within the specified three-month period.

ORDER

The defendants' Motion For Summary Judgment shall be allowed and the plaintiff's Motion For Summary Judgment shall be denied.


Thomas R. Morse, Jr.
Chief Justice of the
Superior Court

Dated: February 1, 1985

